United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

NO. 76-7143

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

ALBERT BRICK,

Plaintiff-Appellant,

v.

CPC INTERNATIONAL, INC.,

Defendant-Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

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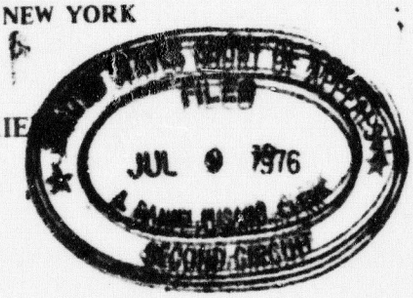

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ARGUMENT

The Brief of appellee accurately reveals the tactics which are apparently the standard procedure of corporate defendants in class actions: namely, (a) avoid at all costs a trial on the merits as a *class* action, and (b) launch a vicious ad hominem attack on plaintiff and his counsel.

In the instant case, the fulminations and accusations of appellee's counsel range from the ludicrous to the slanderous. Thus, appellee's counsel self-righteously proclaims that he did not authorize the placing of his name on the cover of appellant's appendix. How the identification of appellee's counsel is in any way improper, and why the naming of appellee's counsel requires prior permission, escapes counsel for appellant. This type of attack by appellee is of course frivolous.

Much more serious, however, are the scurrilous accusations that appellant has acted unethically. Thus, where appellant stated – in a deposition – that he had been contacted by other stockholders in the corporation, and that he intended to make inquiries of further stockholders as to what information they might have relevant to this action, and as to whether they wished to join as parties plaintiff, counsel for appellee has insinuated to the Court that appellant was soliciting clients for himself.

This type of gutter-fighting – while apparently second-nature to appellee's counsel – hardly comports with the Canons of Professional Ethics which require attorneys to conduct and demean themselves respectfully towards each other.

In the instant case, appellee seeks to mislead the Court and confuse the issues. Thus, appellee seeks to pose as the *protector* of the class for whom the action was brought, in asserting that appellant and his counsel will not properly represent the class. (In this regard it is more than academically interesting to observe appellee's fear that this Court might consider the letter of the Chief Judge of the District of Columbia's Trial Court in commenting on counsel's reputation and ability.)

Appellee asserts that a lawyer should not be the plaintiff in a class action, However, this argument presents an *excuse*, rather than a *reason* for denying class action status. Judge Higginbotham of the United States District Court for the Eastern District of Pennsylvania astutely analyzed the situation in *Umbriac v. American Snacks, Inc.*, 388 F. Supp. 265. He stated at page 275:

"Touche Ross contends that a conflict of interest exists between the representative parties and the class because the named plaintiff, Cletus Lyman, Esquire, is an attorney and partner with counsel for plaintiffs, Richard A. Ash, Esquire, in the law firm of Lyman & Ash. The remaining named plaintiffs, defendants claim, are "siblings" of Cletus Lyman. It is in the nature of the motion practice on class determination issues that defendants who naturally have *no* interest in the *successful prosecution* of the class suit *against* them, are called upon to interpose arguments in opposition to class determination motions *verbally* grounded upon a *concern* for the "best" representation for the class while the *implicit*, but nonetheless *real*, objective of their vigorous legal assaults is to insure "*no*" representation for the class. Of course I must assess defendants' argument upon its intrinsic merit, but on this issue it is my judgment that Lyman's status as an attorney, his business relationship with counsel for plaintiffs, and his family relationship with the other named plaintiffs do not create interests which are adverse to those of the class, and thus neither the named plaintiffs nor counsel for plaintiffs should be disqualified from class representation. Although Cletus Lyman may benefit through his partnership in the law firm of Lyman and Ash from an award of legal fees, if plaintiffs are successful in the present litigation, this interest does not in my opinion create substantially more of a risk that the suit would be compromised unfairly as respects class interests than would exist if there were *no* relationship between the representative parties and counsel for plaintiffs. The vision of substantial counsel fees *might* cloud the judgment of counsel for plaintiffs and the representative parties but the court does not, in granting a motion for class determination, entrust to the representative parties ultimate responsibility for determining the fairness, to the class, of settlement decisions which compromise class interests. *Any compromise* or dismissal of a class action *must be approved* by the *Court* and *notice* of the proposed compromise or dismissal must be given to *all* class members; judicial approval should be granted only after the court determines that the compromise is in the interest of the *entire* class. Fed. Rules Civ. Proc. 23(e). . . .

> In my estimation the safeguard provided in Rule 23(e) against litigation compromises, unfair to the class as a whole, are adequate to insure protection of class interest under the representation of these named plaintiffs and counsel." [Emphasis added].

Obviously, any attorney in a class action stands to gain more than any individual member of the class. This hardly means that he cannot properly represent the class, under the stringent controls provided by the Federal Rules.

In the instant case, Judge MacMahon seized upon an *excuse*, rather than a *reason*, to deny class action certification. When coupled with his actions in allowing the dismissals of the other class actions then before him, he deprived the class – stockholders of CPC – of *any* protection whatsoever. Appellee's argument, that there are two other actions now pending before the Court below, is spurious. One action is the comp[illegible]on case of this same appellant which was transferred to this jurisdiction only because the instant case is here. Obviously it faces the same fate at the hands of Judge MacMahon as this case.

The second case, referred to by appellee, has apparently just been filed. Presumably that poor plaintiff and his counsel will be promptly subjected to the same abuse as has been produced thus far by appellee in this action.

Appellant therefore asserts that the action of the lower court in denying class action status was erroneous and an abuse of discretion.

The further contention of appellee that no class action has been demonstrated herein is patently absurd. The complaint asserts that fraudulent representations and non-disclosures were made by appellee in its public offering of stock. If these allegations are true – and their truth must be assumed for the purpose of class action certification – quite obviously *every* stockholder who purchased said stock was defrauded. The complaint itself bespeaks the class action nature of the suit. It does not require citations of legal authorities to demonstrate that the wrongdoing of the appellee had effect on all the parties who purchased stock in the corporation.

In any event, the impropriety of this argument of appellee should be self-evident, since the lower court never intimated in its ruling, that this was not properly a class action, but only that appellant and his counsel would not properly represent the class.

On the only other real issue on appeal – namely, whether this Court should direct the lower court to retransfer this cause to the District of Columbia – appellee again seeks to misdirect and confuse the court. Over and over appellee asserts that an order transferring a case from one court to another is not appealable. But that is merely a confusion of "appealability" of orders vis-a-vis "reviewability". Appellee has admitted – on page 14 of its Brief – that under the "death knell" doctrine, the order in this case denying class action certification constituted a final, appealable order. Under the circumstances, since this Court has jurisdiction over the appeal, it has the right to review *all* interlocutory orders, whether or not they might have been appealable, standing alone.

The proposition that "all interlocutory orders merge in a final judgment and are reviewable therefrom" [*Sackett v. Beaman*, 399 F.2d 884, at page 889, fn. 6] is hornbook law, recognized universally. See also, *Grabner v. Willys Motors, Inc.*, 282 F.2d 644; *U.S. v. 687.30 Acres of Land*, 451 F.2d 667, 670. In *Grabner*, in reviewing an order quashing a summons, the court held, at page 646:

"The appeal from the order of April 20, 1959, granting the motion for Summary Judgment enabled appellant to question *all* interlocutory orders which led to the entry of that order." In *687.30 Acres*, the court held, at page 670: "Of course, *all* interlocutory rulings are subject to *review* upon appeal from final judgment." [Emphasis added].

In *M.T. Reed Const. Co. v. Virginia Metal Products*, 214 F.2d 127, the 5th Circuit held, at page 128: "Such notice of appeal drew in question, and brought up to the appellate court, *all* prior rulings of the Court that rendered the judgment, and *all interlocutory orders* and relevant matters that preceded it."

In a case similar to the instant case, involving an order of transfer, the 8th Circuit held, *Technitrol, inc. v. McManus,* 405 F.2d 84, at p. 88: "The ruling on the transfer order, as is the situation with interlocutory orders generally, remains open for consideration *upon appeal from final judgment.*" [Emphasis added].

This Honorable Court has itself stated, in *Portman v. American Home Products Corp.*, 201 F.2d 847, p. 848: ". . . the usual rule is that errors made at any stage of an action are reviewable upon appeal from a final judgment, provided they were not reviewable before."

Finally, appellant refers this Honorable Court to its own ruling in *Bradford v. Harding,* 284 F.2d 307. That case was analogous to the instant case, though not identical. In *Bradford,* an action filed in the state court was transferred to the Federal Court. Thereafter, plaintiff moved for a remand to the state court, but the motion was denied. After final judgment, appellant asserted as error the denial of the remand, and appellee charged appellant with laches in not taking an immediate appeal from such denial. This court held, at page 309: ". . . plaintiff promptly moved for remand. . . . Since the denial of his motion was interlocutory and unappealable, he was obligated to litigate in the federal court until final judgment, and thus cannot be charged with laches for doing so. On appeal from the final judgment, he may challenge the denial of remand."

Since it is thus so abundantly apparent that this court does have the right to review Judge MacMahon's refusal to transfer this action back to the District of Columbia, one must question why appellee has been trying so desperately to prevent such a review.

The apparent and logical answers to this question are: (a) that this case clearly belongs in the District of Columbia, not in New York; and (b) in view of the lower Court's past track record in the CPC cases, it becomes further dubious as to whether the class in this case would stand any reasonable likelihood of success, if this case were merely remanded, and not retransferred out of this jurisdiction.

In view of all the foregoing, appellant prays that this Court reverse and remand with instructions to transfer this action to the United States District Court for the District of Columbia.

Respectfully submitted,

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July, 1976.

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Defendant-Appellee

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CERTIFICATE OF SERVICE

I hereby certify that I have served by hand (by mail) two copies of the Appellant's Reply Brief in the above-entitled case, on the following counsel of record, this 7 day of July 1976.

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